

STATE OF MICHIGAN
COURT OF APPEALS

ALLEN FAY SHROYER and CLAUDIA KATHE
IAMS,

UNPUBLISHED
May 16, 2006

Plaintiffs-Appellees,

v

DAVID KLEIN,

No. 257842
Livingston Circuit Court
LC No. 03-020032-CZ

Defendant-Appellant,

and

GARY CAMELET, JUDD PAUL, HAROLD M.
MILLS, ROSEWOOD FARM, INC., and
HEATHER DRAVES,

Defendants.

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

I.

Defendant, Deputy David Klein of the Livingston County Sheriff's Department, appeals the trial court's order that denied his motion for summary disposition. Plaintiffs allege that Deputy Klein caused damage to their property and violated their constitutional rights when he permitted agents of codefendant Heather Draves to take possession of two horses that plaintiff Claudia Iams claims she was entitled to keep. We reverse and remand.

In 1997, Claudia Iams and Heather Draves agreed that Iams would take possession of Draves' mare, Effe. Iams and Draves agreed that Iams could breed Effe and would be responsible for her board and other expenses associated with her care. The women later modified the agreement to include a partnership arrangement in which Iams would own every other foal born to Effe, with the others jointly owned with Draves. According to Iams, the partnership foals were to be sold at her discretion and the profits would be shared only after she was reimbursed for the expenses of caring for Effe and the foals that were jointly owned. Iams said that, with regard to the horses that would belong only to her, she would solely responsible for Effe's expenses when she was in foal with them.

On August 10, 2001, Draves sent codefendants Harold Mills and Judd Paul to retrieve Effe and two of her foals from Iams. Iams and her husband Grant lived on property owned by Iams' parents, Allen and Brigitte Shroyer. Msrs. Mills and Paul arrived at Shroyer's property and spoke with Brigitte Shroyer, who became very upset and said that they could not take the horses. Grant called Iams to come home and also called 911. When Deputy Klein arrived, he was faced with competing claims to the foals. Mills and Paul said that they were there on behalf of Draves, the owner of the horses, and showed defendant a registration paper for Effe that listed Draves as the owner. Iams asserted that she was entitled to possession of Effe and claimed a stableman's lien for unpaid expenses for her board and care. She also said she was the owner of the foals. Deputy Klein called his sergeant, codefendant Sergeant Gary Camelet, for advice and Sergeant Camelet said that, based on the information presented to him, Paul and Mills could take the horses. Iams and her family were very visibly upset and, according to Grant Iams, the situation got "out of hand," and Deputy Klein threatened to make arrests. Paul and Mills took Effe and one of the foals but were unable to corral the other foals.

II.

Plaintiffs allege that, as a result of Deputy Klein's actions, significant damage was done to Shroyer's septic field. Further, Iams contends that defendant's conduct deprived her of her property without due process in violation of the Fourteenth Amendment, US Const, Am XIV. *Board of Regents v Roth*, 408 US 564, 569-570; 92 S Ct 2701; 33 L Ed 2d 548 (1972).

A. Governmental Immunity

Deputy Klein argues that he is entitled to immunity from plaintiffs' tort claim under the governmental tort liability act, MCL 691.1407(2).¹ We agree. This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A government employee is immune from tort liability for an injury he causes in the course of his employment if the following conditions are met: (1) the "employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority," (2) "[t]he governmental agency is engaged in the exercise or discharge of a governmental function," and (3) the "employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Gross negligence suggests an "almost willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 684 NW2d 894 (2004). Accordingly, evidence of ordinary negligence does not create a material question of fact concerning gross negligence. *Maiden v Rozwood*, 461

¹ Subsection (1) of the § 1407 addresses the scope immunity for governmental agencies and subsection (2) addresses the scope of immunity for governmental employees.

Mich App 109, 122-123; 597 NW2d 817 (1999). To satisfy the causation requirement, the defendant's conduct must be "the most immediate, efficient, and direct cause" of plaintiffs' injuries. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

Viewing the evidence in the light most favorable to plaintiffs, we conclude that no reasonable observer would find that Deputy Klein demonstrated the type of "reckless" disregard for injury contemplated by the statute. Nothing in the record indicates that Deputy Klein knew or should have known that Shroyer's septic field would be damaged in the process of retrieving the horses. Therefore, there could be no wilful or reckless disregard for the risk of possible property damage.

Also, plaintiffs fail to establish that Deputy Klein's conduct was the proximate cause of the property damage. Though a government official's negligence may set off a chain of events that results in damage, the negligence may not be *the* proximate cause of the damage. See, e.g., *Miller v Lord*, 262 Mich App 640, 644; 686 NW2d 800 (2004) (granting summary disposition in favor of teacher who sent student into the hallway where she was sexually assaulted by another student); *Kruger v White Lake Twp*, 250 Mich App 622, 627; 648 NW2d 660 (2002) (granting summary disposition in favor of police officer who took plaintiff into custody after which she escaped and was hit by a car).

Although Mssrs. Mills and Paul waited for Deputy Klein's permission to take the horses, the more direct cause of their actions was their agreement with Draves, and the most immediate cause of the property damage was the conduct of Mills and Paul. Further, no evidence suggests that Deputy Klein could not have foreseen that the septic field would be damaged. Therefore, his conduct was not the proximate cause of Shroyer's property damage.

Accordingly, we conclude that the trial court erred in denying Deputy Klein's motion for summary disposition of plaintiffs' tort claim because Deputy Klein's conduct was neither grossly negligent nor the proximate cause of the damage to Shroyer's property.

B. Section 1983

With regard to plaintiffs' claim under 42 USC 1983, Deputy Klein argues that he is entitled to qualified immunity because Iams does not have a constitutionally protected property interest in the horses. Whether a defendant is entitled to qualified immunity is a question of law that we review de novo. *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000). While we agree that plaintiffs have failed to allege a procedural due process violation, we reach this conclusion not because they lacked a property interest in the horses, but because adequate remedies for their injury are available under state law.

Under 42 USC 1983, a person who is deprived of "any of the rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" may file an action seeking relief against the party that caused the deprivation. See also *Hojeije v Dep't of Treasury*, 263 Mich App 295, 303; 688 NW2d 512 (2004). An officer sued for an alleged violation of a constitutional right, however, may invoke the defense of qualified immunity to avoid the burden of standing trial. *Id.*, quoting *Saucier v Katz*, 533 US 194, 200; 121 S Ct 2151; 150 L Ed 2d 272 (2001).

Saucier sets forth a two-part inquiry to determine whether a government official is protected by qualified immunity. *Saucier, supra* at 201. The threshold question is whether, taken in the light most favorable to the party asserting the injury, the alleged facts show that the officer's conduct violated a constitutional right. *Id.* If so, the court must determine whether the right was clearly established. *Id.* A right is clearly established if it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Id.* at 202.

Plaintiff Iams alleges that Deputy Klein exceeded his authority and, as a result, deprived her of property without due process of law. "In suits for deprivation of property without due process filed pursuant to 42 USC 1983, the plaintiff has the burden of pleading and proving the inadequacy of state remedies to redress the wrong." *Blue Cross and Blue Shield of Mich v Commissioner of Ins*, 155 Mich App 723, 732; 400 NW2d 638 (1987). See also *Vicory v Walton*, 721 F2d 1062, 1066 (CA 6, 1983). Plaintiff Iams does not allege that defendant acted according to an established state procedure, but instead alleges that he "exceeded" his authority when he permitted Mssrs. Mills and Paul to take the horses. When a § 1983 claim is based on an intentional or negligent deprivation of property by a state official who is not acting in accordance with any established state procedure, the existence of adequate post-deprivation remedies satisfies due process. *Zinermon v Burch*, 494 US 113, 129-130; 110 S Ct 975; 108 L Ed 2d 100 (1990).

Plaintiff Iams has not alleged that available state tort remedies are inadequate to redress her injury, such as an action to recover possession and damages under MCL 600.2920. Therefore, she has not alleged a violation of a constitutional right, and the trial court erred when it denied defendant's motion for summary disposition.

We reverse and remand for further proceeding consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder